

SERVICE DATE – FEBRUARY 15, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36259¹

KEAN BURENGA AND CHESAPEAKE AND DELAWARE, LLC—CONTINUANCE IN
CONTROL EXEMPTION—DOVER AND DELAWARE RIVER RAILROAD, LLC

Docket No. FD 36258

DOVER AND DELAWARE RIVER RAILROAD, LLC—LEASE WITH INTERCHANGE
COMMITMENT AND TRackage RIGHTS EXEMPTION—NORFOLK SOUTHERN
RAILWAY COMPANY AND NEW JERSEY TRANSIT CORPORATION

Digest:² This decision allows Kean Burenga and Chesapeake and Delaware, LLC, both noncarriers, to continue in control of Dover and Delaware River Railroad, LLC (DDRR), when DDRR becomes a Class III rail carrier in a related transaction involving its lease and operation of trackage rights in New Jersey. This decision also sets an effective date for the related transaction, which the Board had previously held in abeyance.

Decided: February 14, 2019

By petition filed on December 4, 2018, in Burenga—Continuance in Control Exemption—Dover & Delaware River Railroad, Docket No. FD 36259, Kean Burenga (Burenga) and Chesapeake and Delaware, LLC (CAD) (collectively, petitioners) seek an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 11323 to continue in control of Dover and Delaware River Railroad, LLC (DDRR) when DDRR becomes a Class III rail carrier. As discussed below, the Board will grant the exemption.

BACKGROUND

DDRR is a wholly-owned subsidiary of CAD, a noncarrier holding company. (Pet. 1-2.) Through equity ownership, CAD currently controls one Class III carrier: Dover and Rockaway River Railroad, LLC (Rockaway). (Id. at 2.) Burenga is an individual and noncarrier who is the

¹ These proceedings are not consolidated. A single decision is being issued for administrative purposes.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

president of CAD, owns 20% of CAD's equity, and serves as one of CAD's five directors. (*Id.*) Burenga is also the president of DDDR. (*Id.*) Burenga does not have a contract for his services as DDDR's president, and he is not DDDR's general manager. (*Id.* at 2-3.) Burenga does not believe that he "controls" DDDR, either directly or indirectly, through his various ownership interests and management positions. (*Id.* at 3.) However, Burenga joins the petition in the event the Board were to determine that he controls DDDR.³ (*Id.*)

In a related transaction in Dover & Delaware River Railroad—Lease with Interchange Commitment & Trackage Rights Exemption—Norfolk Southern Railway, Docket No. FD 36258, DDDR filed a verified notice of exemption to lease and operate 27.2 miles of rail lines from Norfolk Southern Railway Company (NSR) (Leased Lines) and to operate, pursuant to a trackage rights agreement,⁴ 80.7 miles of rail lines owned by NJT (Trackage Lines) (collectively, the Lines), all in the State of New Jersey.⁵ Notice of the exemption was served and published in the Federal Register on December 20, 2018 (83 Fed. Reg. 65,389). The exemption was scheduled to become effective on January 3, 2019, but the Board's notice held the effective date of the exemption in abeyance pending review of the continuance-in-control petition in Docket No. FD 36259.

In support of their petition, petitioners state that their continuance in control of DDDR will allow DDDR to benefit from their collective administrative, financial, marketing, and operational experience in the region, thereby promoting DDDR's ability to provide safe and efficient service to shippers. (Pet. 4.) Petitioners also state that shippers' access to freight

³ Burenga previously sought authority to continue in control of Rockaway once Rockaway became a Class III rail carrier. (See Pet. 2 (citing Burenga—Continuance in Control Exemption—Dover & Rockaway River R.R., FD 36125, slip op. at 1 (STB served June 16, 2017)).) In that verified notice, Burenga explained that he controls a Class III rail carrier, Belvidere & Delaware River Railway Company, Inc. (BVDR), and possibly another Class III rail carrier, Black River & Western Corp. (BRWC). Burenga stated that he is a minority shareholder of Rockaway and BRWC and that he filed the verified notice in Docket No. FD 36125 in an abundance of caution to exempt his control of Rockaway were the Board to determine that he controls Rockaway and BRWC. In the notice of exemption, the Board stated that the notice did not constitute a ruling on whether Burenga controlled, or needed authority to control, BRWC or Rockaway, but rather stated that the Board's exemption authority is permissive. Burenga, FD 36125, slip op. at 1 n.1. In granting the current petition for exemption, the Board likewise notes that its exemption authority is permissive, and this decision does not constitute a ruling that Burenga controls, or needs authority to control, BRWC, Rockaway, or DDDR.

⁴ The parties to the trackage rights agreement are DDDR, NSR, and New Jersey Transit Corporation (NJT).

⁵ NSR owns the Leased Lines, and NJT owns the Trackage Lines, over which NSR holds a residual freight easement. NSR currently provides freight service on the Lines.

service will not be reduced because DDDR will merely substitute for NSR in handling freight service over the Lines. (Id. at 7.) Petitioners further assert that their control of DDDR, together with the other carriers they control, will allow them to better coordinate service moving to and from NSR. (Id. at 7-8.) Finally, petitioners state that no interchange commitment is being imposed in connection with this continuance in control transaction.⁶ (Id. at 5.)

Petitioners state that while the proposed control transaction does not involve a Class I carrier, the transaction does not qualify for the class exemption under 49 C.F.R. § 1180.2(d)(2) because the Lines over which DDDR will operate connect with Rockaway's lines. (Id. at 3-4.) As such, petitioners filed this petition to secure authority to continue in control of DDDR once DDDR becomes a rail carrier. (Id. at 3.)

Petitioners request expedited consideration so DDDR's notice of exemption in Docket No. FD 36258 can become effective as soon as possible. (Id. at 9.) Petitioners represent that NJT will be implementing Positive Train Control (PTC) on the Trackage Lines in 2019, and DDDR would like to begin operations as soon as possible so that it can have as much time as possible to coordinate implementation of the PTC installation with NJT. (Id.)

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 11323, prior approval from the Board is required for transactions involving the common control of two or more rail carriers. Under 49 U.S.C. § 10502(a), however, the Board must exempt a transaction from regulation if it finds that: (1) regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101; and (2) either (a) the transaction is limited in scope, or (b) regulation is not needed to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed control transaction through an application for review and approval under 49 U.S.C. §§ 11323-25 is not necessary here to carry out the RTP. Rather, an exemption would promote the RTP by minimizing the need for federal regulatory control over the proposed transaction and by reducing regulatory barriers to entry. See 49 U.S.C. § 10101(2), (7). Granting an exemption would also foster sound economic conditions in transportation. See id. § 10101(5). Other aspects of the RTP would not be adversely affected.

Regulation of the control transaction is also not needed to protect shippers from an abuse of market power.⁷ Shippers' access to rail service over the Lines will not be reduced. DDDR will simply begin providing service over the Lines that was previously provided by NSR.

⁶ Petitioners note that in the related transaction in Docket No. FD 36258, DDDR's lease with NSR includes an interchange commitment that will affect DDDR's interchange with carriers other than NSR on the Leased Lines.

⁷ Given this finding, the Board need not determine whether the transaction is limited in scope.

Therefore, there should be no adverse impact on rail operations. See Twin Cities & W. R.R.—Continuance in Control Exemption—Sisseton Milbank R.R., FD 35642, slip op. at 3 (STB served July 18, 2012). Moreover, no shipper (or any other entity) has objected to the control transaction or to DDDR's proposed lease and operation of the Leased Lines and operation of the Trackage Lines in Docket No. FD 36258.

Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under §§ 11324 and 11325 that involve only Class III rail carriers. Therefore, because all of the carriers involved in the continuance in control transaction are Class III carriers, the Board may not impose labor protective conditions.

The control transaction is not subject to the environmental reporting requirements under 49 C.F.R. § 1105.6(c)(1)(i) because it will not result in any significant change in carrier operations. Similarly, the transaction is not subject to the historic reporting requirements under 49 C.F.R. § 1105.8(b)(3) because it will not substantially change the level of maintenance of railroad properties.

Petitioners have requested expedited consideration of their petition. DDDR states that it would like to begin operations as soon as possible so that it can have the maximum amount of time to coordinate with NJT on NJT's implementation of PTC on the Trackage Lines. The Board finds that petitioners' request is reasonable and therefore will make the exemption effective on February 25, 2019. See 49 C.F.R. § 1121.4(e) ("Unless otherwise specified in the decision," an exemption generally will be effective 30 days from service of the decision). In addition, the exemption in Docket No. FD 36258 will also become effective on February 25, 2019.⁸

It is ordered:

1. In Docket No. FD 36259, the Board, under 49 U.S.C. § 10502, exempts from the prior approval requirements of 49 U.S.C. §§ 11323-25 Burenga's and CAD's continuance in control of DDDR when DDDR becomes a Class III rail carrier.
2. Notice of the control exemption will be published in the Federal Register.

⁸ Because of the partial Federal government shutdown from December 22, 2018 to January 25, 2019, the Board's consideration of this petition was delayed.

3. The control exemption will be effective on February 25, 2019. Petitions for stay must be filed by February 20, 2019. Petitions to reopen must be filed by March 7, 2019.

4. The notice of exemption in Docket No. FD 36258 will be effective on February 25, 2019. Petitions for stay must be filed by February 20, 2019.

By the Board, Board Members Begeman, Fuchs, and Oberman.